

<b>MARC E. NORMAN</b>	:	BEFORE THE
	:	
Appellant	:	HOWARD COUNTY
	:	
vs.	:	BOARD OF APPEALS
	:	
<b>HOWARD COUNTY PLANNING BOARD, et al.</b>	:	BA Case No. 674-D
	:	
Appellee	:	
	:	

.....

### **DECISION AND ORDER**

On March 1, March 8, March 16, April 12, May 10, May 24, June 14, August 4, August 30, November 8, November 30 and December 13, 2011, the Board of Appeals (the "Board") convened to hear the appeal of the Appellant, Marc E. Norman (the "Appellant"). The Appellant is appealing the Howard County Planning Board's ("Planning Board") approval of Site Development Plan 08-032 (the "SDP"), the Vantage Condominiums at Turf Valley.

All members were present at all hearings or present for voting purposes having reviewed all of the evidence submitted and listened to a recording of the portion of the hearing for which the member was not present. Chairman James Walsh and Vice-Chairman Henry Eagles presided over all hearings. Barry Sanders, Assistant County Solicitor, served as legal advisor to the Board.

The Appellant was *pro se*. Mangione Family Enterprises of Turf Valley ("Mangione"), an interested party, also appeared at the hearings in opposition to the appeal and was represented by Sang Oh, Esquire.

The requisite notice of the hearing was advertised and an affidavit of written notification of the place, time and date of the initial hearing was provided to the clerk of the

Board pursuant to the Board's Rules of Procedure. The Board members indicated that they had viewed the Property as required by the Zoning Regulations.

This case is a *de novo* appeal and was conducted in accordance with Section 2.210(a) of the Board's Rules of Procedure. The Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, the Howard County Subdivision and Land Development Regulations, the General Plan for Howard County, the General Plan of Highways, the Technical Staff Report by the Department of Planning and Zoning ("DPZ") for the Planning Board Meeting of April 1, 2010 (the "TSR") and the Petition, as submitted by the Appellant, were incorporated into the record by reference.

In support of his appeal, Appellant presented his own testimony as well as the testimony of a number witnesses as detailed below and also introduced various exhibits as contained and itemized in the record.

In opposition to the appeal, Mangione presented the testimony of a traffic engineer and an architect as detailed below. Mangione also introduced into evidence various exhibits as contained and itemized in the record.

#### **FINDINGS OF FACT**

1. The properties that are the subject of SDP-08-032, parcels B-1 and B-2 of the Turf Valley subdivision (collectively, the "Property"), are 2.06 and 2.60 acres±, respectively. The Property is located on the north side of existing Resort Road, approximately 1000 feet east of Turf Valley Road in Ellicott City, Maryland. The Property is part of the 809 acres± Planned Golf Course Community Zoning District ("PGCC") called Turf Valley.

2. Briefly stated, the subject Property is being proposed to be developed as two residential multi-family buildings and associated site improvements. The proposed buildings each have 30 condominium units (the "Development").

3. After reviewing SDP-08-032 under the applicable standards and criteria relating to site development plan approval including existing conditions, the site improvements, environmentally sensitive areas, stormwater management, erosion and sediment control, landscaping, forest conservation, coverage, height, setback, parking requirements, golf course redevelopment and the six Planning Board criteria as detailed below, DPZ recommended that the Planning Board approve SDP-08-032.

4. The Planning Board considered SDP-08-032 at its regularly scheduled meeting held on April 1, 2010. Under Section 1.106 of the Planning Board's Rules of Procedure, the Planning Board review the SDP in a "public meeting", which was not a quasi-judicial "public hearing" or contested case under Article III of the Howard County Administrative Procedure Act (the "Howard County APA"). Based on the testimony presented at the public meeting, the Planning Board approved SDP-08-032.

5. The Appellant appealed the Planning Board's decision of approval to the Board to be heard *de novo* under Board of Appeals Rules of Procedure 2.210(a).

6. Appellant alleges five bases of error in his appeal petition. (1) [T]he [P]roperty is not exempt from forest conservation requirements and the SDP fails to include a Forest Conservation Plan; (2) the Planning Board erred by finding that the building design will mitigate any visual impact that the proposed building length, in excess of the maximum residential building length of 120 feet, will have on the community; (3) the building height in the SDP exceed the maximum building height allowed; (4) the SDP does not result in an



appropriate arrangement of uses within the district; and (5) the Planning Board erred in finding that the traffic impact from the proposed use is acceptable.

7. Appellant's witnesses testified as follows:

- a. Louis Mangione (hostile witness): stated that the developer met all the requirements of law for plan approval.
- b. Rosemary Campbell: lives about 2000 feet from the subject site. Ms. Campbell felt misled about the fact that apartments are going to be built on the Property. Was concerned about the traffic impacts of coming out of her development and felt that traffic needed to be safe to ride a bicycle.
- c. Gerard J. Prudhomme: bought his home in 2002. Mr. Prudhomme stated that he was not advised that there was going to be considerably dense development being proposed on the Property and did not understand how the additional traffic could be handled. Mr. Prudhomme did not believe the Development was compatible and could not be visually obscured.
- d. Lori Wilson: Ms. Wilson has lived on Golf Island Road since 2007. She has a pool in her backyard and felt that people would be able to stare into her backyard from the proposed buildings. She was further concerned about noise, impact on the school system and the size of the proposed buildings given the size of the Property.
- e. Louis Foran: lives on Golf Island Road and felt that the proposed buildings were too large. Mr. Foran asked the Board to examine not what is allowed nor what is legal, but what is right.

- f. Andrew Hahn: has lived on Golf Island Road since 2006. Mr. Hahn stated that the size and scope of the proposed development is inappropriate.
- g. Angela Beltram: has lived in Howard County for 46 years. She supported a flexible, green mixed-use development, but felt that the proposed buildings were too large for the area and too close to the existing residences. Ms. Beltram did not express any opposition to apartments being allowed in the PGCC.
- h. Surender Dhawan: has lived on Golf Island Road since 2000. Mr. Dhawan's home is about 500 feet from the Property. Mr. Dhawan believed that the proposed buildings were too large.
- i. Nour Mohammadi: has lived on Golf Island Road since 1999. Mr. Mohammadi opposed the proposed Development.
- j. Linda E. Spencer: Ms. Spencer testified that she opposed SDP-08-032 because of the impact that it is likely to have on Turf Valley Road. She believed that given the width of Turf Valley Road and its topography, the proposed development would increase traffic and create a safety hazard for the residents residing on Turf Valley Road and as well as decreasing their property values. To demonstrate her concerns, she showed the Board a video of a vehicle traversing Turf Valley Road. Ms. Spencer also provided a plan where she detailed the road widths on Turf Valley Road in order to show the Board its inadequacy to support larger volumes of traffic. On cross-examination, Ms. Spencer indicated that she had no particular expertise in traffic and was not offering any evidence to refute the

determination by the Planning Board that the roads serving the PGCC District will be adequate, as determined by the capacity and mitigation standards of the Adequate Public Facilities Ordinance.

- k. Charles Edward Walter: testified as an ex-employee of Howard County having been chief of the Division of Traffic Engineering for the Department of Public Works. Mr. Walter testified as to the factors that are considered in the approval of a proposed development. Mr. Walter felt that the overall traffic impacts in and around Turf Valley have not been sufficiently studied. He felt that traffic on MD 99 and US 40 was “chaotic” and that there was no plan to make improvements. Mr. Walter testified that Turf Valley Road needed to be reconstructed to accommodate the amount of vehicle trips that would be occasioned by the new Development. Mr. Walter opined that safety and the Design Manual for Howard County required denial of the proposed Development until all necessary improvements to roads were made. On cross-examination, however, Mr. Walter made it clear that his testimony was not addressing the test under the capacity and mitigation standards of the Adequate Public Facilities Ordinance (Title 16, Subtitle 11 of the Howard County Code). Instead, Mr. Walter was addressing a generic issue of traffic safety. Mr. Walter could not specifically reference for the Board any section of law that would support his opinion that SDP 08-032 should have been denied.
- l. Hollys Allen: lives on Turf Valley Road and asked the Board to phase and delay development until a traffic solution could be proposed and built.



- m. Robert Ostergaard: has lived on Turf Valley Road for 7 years and believes that an increase in traffic on Turf Valley Road will decrease safety for pedestrians. Mr. Ostergaard stated that he dodges traffic when he walks on Turf Valley Road and that he felt that sidewalks were needed to make Turf Valley Road safer.
- n. William Gasser: Mr. Gasser, a former planner and real estate professional, testified that the “repetition” of pattern of the proposed buildings and its “angularity” leads to the conclusion that the additional building length was not sufficiently mitigated. Among Mr. Gasser’s contentions was his testimony that the location of the proposed buildings was an inappropriate arrangement of land uses within the Turf Valley PGCC district. On cross-examination, Mr. Gasser admitted that his conclusion on the inappropriateness of the arrangement of land uses was based solely on his opinion that the proposed buildings were too close to existing single-family detached and attached residences. On cross-examination, Mangione introduced numerous exhibits showing a number of developments throughout Howard County with lesser distances between multi-family dwellings and single-family detached and attached residences. Mr. Gasser opined that all of these other developments were inappropriate arrangements of land uses.
- o. Marc Norman: lives on Golf Island Road and would be able to see the proposed buildings. Mr. Norman explained how he had worked through the process to ensure a better development for the PGCC, but felt that a real

safety issue exists to necessitate denial of SDP 08-032. Mr. Norman was concerned about the width of the roads, overall safety and the quality of life in his neighborhood.

8. Mangione called two witnesses. Mickey Cornelius, a certified traffic engineer, testified that the traffic study underlying SDP-08-032 (the "Traffic Study") satisfied all requirements of law, including the test that the roads serving the PGCC District of Turf Valley will be adequate as determined by the capacity and mitigation standards of the Adequate Public Facilities Ordinance. Mr. Cornelius testified that the original Traffic Study was submitted with the 4<sup>th</sup> Amended Comprehensive Sketch Plan and that Howard County Code Section 16.1105(d)(1) does not require the submission of a new, additional traffic study provided that the projected traffic volume from the Vantage Condominiums does not exceed projected volumes contained in the original Traffic Study.

9. Mr. Cornelius testified the Traffic Study took into account the proposed traffic to be generated by the Vantage Condominiums and that the actual traffic to be generated by this project was consistent with or less than that projected by the Traffic Study.

10. Mr. Cornelius also testified that he believed Turf Valley Road was safe. He opined that Turf Valley Road is generally straight and does not possess extraordinary topography to cause unsafe conditions. Like many other minor collector roads throughout Howard County, the fact that the road was 24 feet or less in certain portions does not make Turf Valley Road unsafe or permit Howard County or the Planning Board to require a developer to upgrade or fix a public road beyond 250 feet of a proposed development.

11. Finally, Mr. Cornelius testified that evidence regarding the width of Resort Road, the length of a cul-de-sac or safety of any segment of Turf Valley Road is not a part of



the test to determine the capacity and mitigation standards of the Adequate Public Facilities Ordinance (Title 16, Subtitle 11 of the Howard County Code).

12. Jeff Henneman, a certified architect, testified to the design of the proposed structures and their locations. Mr. Henneman explained that the use of different materials with different colors, the avoidance of a flat façade by jogging certain portions of the Buildings and the shadows created by the jogs and the use of existing landscaping bordering the western-most Building mitigated the impact of the additional length.

13. Mr. Henneman also testified about golf course holes #'s 4 and 16 being designated open space and between the buildings and residential dwelling units on adjoining lands, the pure distance and physical separation of the Buildings from other homes, landscaping and the retention of existing forests along with the 12-foot mound between the Buildings and Golf Island Road as being substantial support for the Planning Board's conclusion that Mangione's SDP satisfied Howard County Zoning Regulations Section 126.F.4.c.

### **CONCLUSIONS OF LAW**

1. As a preliminary matter, there were arguments and discussion on which party had the burden of proof in this case. Although all parties agreed that Section 2.210 of the Board's Rules applied to this case, Appellant argued that because there was no record created before the Planning Board, Mangione had the burden of proof before the Board. After reviewing Section 2.210(a)(4)(ii), however, the Board determined that the plain language clearly placed the burden of proof on the Appellant, Norman. Because Appellant carries the burden of proof, Section 2.210(a)(2)(iii) of the Board's Rules of Procedure labels Appellant the "proponent" of the appeal and required Appellant to present his case-in-chief prior to the

presentation of the cases-in-chief of parties not carrying the burden of proof. To hold otherwise, would render the language in 2.210(a)(4)(ii) as surplusage.

2. Additionally, the Planning Board's decision letter of April 1, 2010, in which they noted their approval of SDP 08-032, met the requisite legal requirements for SDP approval in the PGCC district and was not an error of law. An argument was made that a written decision and order with findings of fact was required to be issued by the Planning Board in support of its decision in this case. The Board rejected this argument, however, finding that under 1.106 of the Planning Board's Rules of Procedure, the Planning Board's consideration of SDP 08-032 was not required to be held under quasi-judicial rules as a contested case, which is subject to Article III of the Howard County APA. Accordingly, the rules and requirements for contested cases, including the right to subpoena witnesses, the specific order of a hearing and rules pertaining to decisions and orders, including Section 2.119 of the Howard County APA, were not applicable to the Planning Board's consideration of SDP 08-032.

3. The Board also finds that the requirements of due process were satisfied in this case. The claim that the Planning Board's letter of April 1, 2010 was not a "decision" is without merit. It was, in fact, a decision. More importantly, however, it was a decision that the Appellant was able to challenge by presenting a *de novo* case before the Board of Appeals by presenting evidence anew, without any restrictions on what was previously presented. The Board's review in this case was not an "on the record" appeal that was confined to evidence that was already presented. Given this fact, the Appellant was afforded ample due process to present evidence and arguments as to why SDP 08-032 should not have been approved. The Board is unaware of any law or case law that requires the Appellant to be afforded multiple

opportunities to present a case and have each of those hearings be reduced to a record and a decision and order with specifically-written findings of fact and legal conclusions.

4. The Board further notes that Appellant neither pled nor raised any alleged violations of the Howard County APA. Even if such allegations had been pled or raised, the Board finds that the Planning Board complied with all requirements of the Planning Board's Rules of Procedure and the Howard County APA.

5. Accordingly, the Board required Appellant to present his evidence first to show that the action taken by the Planning Board was clearly erroneous, and/or arbitrary and capricious and/or contrary to law. At the conclusion of the Appellant's case-in-chief, the Board entertained Mangione's Partial Motion to Dismiss. Mangione requested that the following 6 (six) allegations of error/assertions be dismissed due to Appellant's failure to satisfy his pleading burden.

The Board **granted** the motion as to the following:

- (1) HCZR Section 126.F.4.a: Whether the plan is consistent with the Howard County General Plan.
- (3) HCZR Section 126.F.4.e: Whether necessary water and sewer facilities are available to serve the proposed development.
- (4) HCZR Section 126.F.4.f: Any other factors which affect the orderly growth of the County.
- (5) HCZR Section 126.H.1.c.(1): The locations, layout and adequacy of parking, loading and unloading facilities.
- (6) HCZR Section 126.H.1.c.(2): The Site Development Plan shall not be approved unless water facilities and public sewerage facilities have been approved by all



required county, state and federal agencies. In instances where a connection will not be made initially to a public water facility, provisions must be made in the initial Site Development Plan to provide for a connection to public water facilities when they become available, and to require periodic monitoring of the safety and adequacy of the groundwater in the PGCC District and surrounding areas by the appropriate state and county health agencies during the period of private water facility utilization.

The Board **denied** the motion as to:

(2) HCZR Section 126.F.4.c: Whether the relationship between the location of proposed dwelling units, required open space, landscape design requirements, setback requirements and existing dwelling units on adjoining properties is such that the existing dwelling units will be buffered from the proposed development.

Mangione also requested dismissal of 3 (three) allegations of error/assertions due to Appellant's failure to satisfy his production burden.

The Board **granted** the motion as to the following:

(1) Appellant's Point of Error 1: The property is not exempt from forest conservation requirements and the SDP fails to include a Forest Conservation Plan.

The Board **denied** the motion as to the following:

(2) Appellant's Point of Error 3: The building height in the SDP exceeds the maximum building height allowed.

(3) HCZR Section 126.F.4.d: Whether the roads serving the PGCC District will be adequate, as determined by the capacity and mitigation standards of the Adequate Public Facilities Ordinance (Title 16, Subtitle 11 of the Howard County Code).

Consequently, the Board determined that only errors contained in allegations #'s 2 through 5 in his appeal petition along with the criterion contained in Sections 126.F.4.c and 126.F.4.d would continue as viable issues in this case.

**Howard County Zoning Regulations Section 126.D.1.e: the design of the building will mitigate the visual impact of the increased length**

6. There was conflicting testimony from Jeff Henneman and William Gasser on whether the proposed buildings met the requirements of Section 126.D.1.e., which provides that the maximum length of a building shall be 120 feet unless the Planning Board approves a greater length, up to a maximum of 300 feet, based on a determination that the design of the building will mitigate the visual impact of the increased length.

7. Each of the proposed buildings is 159 feet in length.

8. After reviewing the elevations of the proposed buildings, the Board finds Mr. Henneman's testimony as being credible and agrees that the Planning Board's decision to approve the additional building length was based on credible evidence that the design of the building mitigates the visual impact of the increased length. Consequently, the Planning Board's decision was not clearly erroneous, and/or arbitrary and capricious and/or contrary to law.

**Howard County Zoning Regulations Section 126.D.1.a.(1)(c): the maximum building height does not exceed 40 feet**

9. Mangione produced evidence to show that the maximum building height of the proposed buildings as defined by Howard County Zoning Regulation Section 103.A.18 is 40 feet. Howard County Zoning Regulations Section 128.A.3.a provides for an exclusion of the proposed buildings' parapet walls.

10. Appellant produced no probative evidence to contradict Mangione's evidence. Accordingly, the Planning Board's determination on the legality of the heights of the proposed buildings was not in error.

**Howard County Zoning Regulations Section 126.F.4.b: The SDP  
results in an appropriate arrangement of land uses within the district**

11. The Board finds that the arrangement of land uses as proposed is appropriate. There was uncontroverted evidence that the distance of the Vantage Condominiums to existing homes on Golf Island Road and Legends Way is 485 feet and 365 feet. These distances greatly exceed the setbacks provided for in the Howard County Zoning Regulations. The evidence showed that throughout Howard County, there are other similar developments where a multi-family dwelling is adjacent to single-family detached or attached units. The Planning Board's determination that the Project was an appropriate arrangement of land uses was not erroneous.

**Howard County Zoning Regulations Section 126.F.4.c: The relationship between  
the location of Buildings, required open space, landscape design requirements, setback  
requirements and existing dwelling units on adjoining properties is  
such that the Buildings will be buffered from the proposed development**

12. The Board concludes that the amount of open space and distance between the proposed buildings and residential dwelling units on adjoining lands, the proposed landscaping and the retention of existing forests along with the 12 foot mound between the Buildings and Golf Island Road satisfies Section 126.F.4.

13. Mr. Gasser who testified as to inadequate buffering reasoned that the building would still be visible. On cross-examination, however, Mr. Gasser admitted that he had misused the word "buffering" as that term is defined in the Howard County Zoning Regulation Section 103.A.117. Mr. Gasser had mistakenly applied the term "screening" to be



the applicable standard. Given Mr. Gasser's admission, the Appellant failed to meet his burden of proof on this issue.

**Howard County Zoning Regulations Section 126.F.4.d: The roads serving the PGCC District will be adequate, as determined by the capacity and mitigation standards of the Adequate Public Facilities Ordinance (Title 16, Subtitle 11 of the Howard County Code)**

14. The Appellant provided no evidence as to whether the roads serving the PGCC District will be adequate, as determined by the capacity and mitigation standards of the Adequate Public Facilities Ordinance. The only evidence that was presented in this case as to the Adequate Public Facilities Ordinance was the testimony from Mr. Cornelius, who confirmed that the standards under the law had been met and that the Traffic Study was valid and not flawed.

15. Section 126.F.4.d provides that the Planning Board must consider "[w]hether the roads serving the PGCC District will be adequate, as determined by the capacity and mitigation standards of the Adequate Public Facilities Ordinance (Title 16, Subtitle 11 of the Howard County Code)." Appellant produced no evidence regarding the Adequate Public Facilities Ordinance ("APFO") capacity and mitigation standards.

16. While there was, indeed, testimony from numerous witnesses on the possible traffic impacts to Turf Valley Road occasioned by the proposed development, the evidence presented was anecdotal and not empirical. And while the Turf Valley Road residents' testimony was impactful, Maryland courts instruct that the unsupported conclusions or fears of witnesses to the effect that the proposed use of property will or will not result in harm amount to nothing more than vague and general expressions of opinion, which lack probative value. *Anderson v. Sawyer*, 23 Md. App. 612, 329 A.2d 716 (1974). When contrasted with Appellant's own expert witness, Mr. Walter, who provided no testimony on whether the roads

serving the PGCC District of Turf Valley is adequate, as determined by the capacity and mitigation standards of the Adequate Public Facilities Ordinance, the residents' testimony cannot be accorded weight.

17. The Board also considered its prior decision in BA 567-D and BA 675-D where the Board determined that Mr. Cornelius and the same Traffic Study provided ample evidence to support the Planning Board's determination that Mangione had established a prima facie case with regard to meeting the requirement that the roads serving the Turf Valley PGCC District will be adequate, as determined by the capacity and mitigation standards of the Adequate Public Facilities Ordinance (Title 16, Subtitle 11 of the Howard County Code). The Appellant offered no reason to why the Board would not be impermissibly bound to its prior determination.

18. Finally, the Board also addressed the assertion that Howard County Zoning Regulation Section 130.C authorized the Board to consider various aspects of the roads serving Turf Valley beyond those considerations required by Howard County Zoning Regulation Section 126.F.4.d. The Board finds that Section 130.C is not applicable to this case. Instead, the only applicable standard for determining the adequacy of traffic is contained within Section 126.F.4. Howard County Zoning Regulation Section 130.C provides that an "application shall not be approved where" the Board finds various matters unsatisfied (emphasis added). In this appeal, however, the Board was not tasked with approving or disapproving SDP 08-032. The approval of SDP 08-032 was issued by the Planning Board. The Board's jurisdiction in this case was of an appellate nature. In fact, Section 2.210(c) provides that the Board may "dismiss the administrative appeal or may affirm, reverse, or modify the [Planning Board's] action, remand the action to the Planning

Board for further proceedings, or an appropriate combination of the above.” There is no provision that permits the Board to have approval authority over SDP 08-032. The Board contrasts this case with an original jurisdiction application under Section 2.209 where the Board grants an approval or denial of an application.

19. Even if, contrary to the express provisions of Section 126.F.4.d, the generic issue of the safety of any segment of Turf Valley Road were at issue in this case, there was credible testimony from Mr. Cornelius that Turf Valley Road is safe. The Planning Board would not have erred in relying on Mr. Cornelius’ testimony.

### **ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is this 31<sup>ST</sup> day of January, 2012, by the Howard County Board of Appeals, **ORDERED:**

That the petition of appeal of Marc E. Norman appealing the Planning Board’s decision to approve SDP-08-032 dated April 1, 2010, is, hereby, **DENIED** and that the Howard County’s Planning Board’s April 1, 2010 approval of Site Development Plan 08-032, Vantage Condominiums at Turf Valley, is hereby **AFFIRMED**.

**ATTEST:**

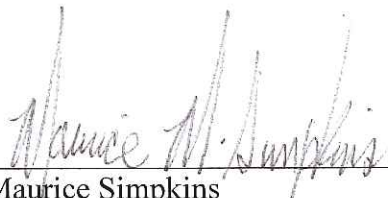
**HOWARD COUNTY BOARD OF APPEALS**

A. Mathieson  
Alison Mathieson, Secretary

James D. Walsh  
\*James Walsh, Chairperson  
John Lederer  
John Lederer, Vice-Chairperson

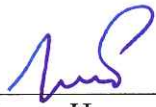


PREPARED BY:  
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COUNTY SOLICITOR

  
Maurice Simpkins

  
Barry M. Sanders  
Assistant County Solicitor


Dissent - See Attached Opinion  
Henry Eagles

  
\*James Howard

\* I hereby certify that I reviewed all of the evidence submitted on May 24, 2011 and listened to a recording of the May 24, 2011 hearing for which I was not present.

  
James Walsh, Chairperson

\* I hereby certify that I reviewed all of the evidence submitted on August 4, 2011 and listened to a recording of the August 4, 2011 hearing for which I was not present.

  
James Howard

**BEFORE THE BOARD OF APPEALS  
OF HOWARD COUNTY, MARYLAND**

**MARC E. NORMAN**

Appellant

v.

**HOWARD COUNTY PLANNING BOARD  
& MANGIONE ENTERPRISES  
OF TURF VALLEY, LP**

Appellees

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Case No. BA 674 - D

**MINORITY OPINION**

In this case Norman has appealed the Planning Board's approval rendered on April 1, 2010, approving Appellee Mangione Enterprises of Turf Valley ("Mangione") of Site Development Plan 08-032 ("SDP") for two condominium buildings, each containing 30 units (60 units total), to be located in the Turf Valley development area zoned as a PGCC district (Planned Golf Course Community). The Turf Valley development property is bounded by U.S. 40 to the south, I-70 to the north, Marriottsville Road to the west and David W. Force Park to the east. The proposed condominiums are to be sited north of the existing Resort Road and east of Turf Valley Road.

Turf Valley Road, classified as a minor collector road,<sup>1</sup> and Resort Road intersect and each road terminates at such intersection. Presently Turf Valley Road is the only ingress and egress of traffic to and from residential development (present and future) sited on and east of Turf Valley Road (north-south road) to Route 40 (east-west road). An existing short segment of Resort Road to the west is connected to Marriottsville Road. An

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<sup>1</sup> Volume III of the Howard County Design Manual, Roads and Bridges, Chapter 1, Para. 1.5 defines "Minor Collector Road":

- A. Provides direct access to local roads and driveway access abutting properties.
- B. Internal distribution of trips within a neighborhood or non residential area or part of a neighborhood or non-residential area.
- C. Connects local roads to one or more major connectors.
- D. Limited amount of through traffic; primarily local in nature.

extension of Resort Road is planned to be constructed at a later date, after construction of the condominiums, to connect to and join the two existing segments of Resort Road.

The following issues were raised and discussed during the hearings in this case.

**A.**

The Planning Board had not rendered a written decision with statement of facts and conclusions of law on to which to base its approval of Mangione's site development plan. A form document was issued merely showing a check mark on a box indicating approval of the site development plan "Based on the testimony presented." Without such notice, Norman was deprived of opportunity to frame his issues for an appeal to this Board. The Planning Board's approval of Mangione's SDP by check mark was accepted by the Board.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information. . . ." *Mullane v. Central Hanover Bank & Trust Co. et al.*, 339 U.S. 306, 314 (1950).

The Planning Board's Rules of Procedure were adopted pursuant to provisions of Howard County Code, Title II "Administrative Procedures," Subtitle I "Howard County Administrative Procedure Act" (APA). These APA provisions apply to the Planning Board's Procedures in addition to the Planning Board's own Rules of Procedure pursuant to §2.103 of the APA. Section §2.119(b) of the APA requires that decisions of an Agency, except rulings on preliminary matters or on motions or objections, shall be in writing, based on evidence of record. *The decisions shall contain findings of facts, conclusions of law, and an appropriate written order or consent decree.*

The Planning Board's Rules of Procedure, **§1.106, Administrative Decision-Making Authority Following a Public Meeting** requires such decision to be rendered



by the Planning Board respecting a petition for a SDP in a PGCC district, §1.106A.3,<sup>2</sup> from which an appeal may be taken to this Board. Section 1.106F provides that “The [Planning] Board shall make a decision by issuing a letter *as required by law*.” (Emphasis added.) This comports with Section 16.900(j)(2) of the Howard County Code (“Code”) requiring that the Planning Board *shall make decisions* with respect to matter submitted to it *pursuant to the laws, rules, regulations, and ordinances of the County* from which an appeal can be taken to this Board.<sup>3</sup>

The Planning Board’s established procedures thus clearly comport with due process requirements. In this case, however, the Planning Board did not follow its own procedures to issue a written decision with findings of fact and conclusions of law which could be appealed to this Board. It is improper for a party to probe the mental processes of an administrator in reaching his conclusion, as would be conjectured from the Planning Board’s approval by a check mark. Those legally responsible for a decision must in fact make it, but their method of

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<sup>2</sup> **Section 1.106. Administrative Decision-Making Authority Following a Public Meeting**

A. Types of Cases

The Board shall conduct a public meeting in accordance with the procedures set forth in the following subsections herein prior to making a decision on the following matters:

3. *Petitions for Site Development Plan approval in the R-ED (Residential; Environmental Development), NT (New Town) (if required by the Planning Board pursuant to Section 125.E.1 of the Zoning Regulations), PGCC (Planned Golf Course Community), PSC (Planned Senior Community) and MXD (Mixed Use Development) Zoning Districts if the Planning Board has reserved that authority for itself when approving the Comprehensive Sketch Plan. . . . [Emphasis added.]*

<sup>3</sup> The majority opinion, pp. 3,10, asserts that the Planning Board’s Rules of Procedure §106, does not come under Article III of the APA, does not apply to this case as a “contested case.” To the contrary, the APA applies to all Howard County agency proceedings except as specifically excluded by §2.103(b) of Article III of the APA. This exclusionary provision does not embrace the Planning Board, as follows:

Sec. 2.103. - Applicability.

(a)*General. Except as provided in subsection (b), the provisions of [this] article II shall apply to and govern the adoption of rules by all County Agencies which are authorized to make rules. In the event of a conflict between this subtitle and a substantive provision of an enabling act of an Agency, the latter shall prevail.*

(b)*This article does not apply to the following Agencies: The Adult Public Guardianship Review Board, the Advisory Board on Consumer Affairs, the Board of Appeals, the Board of Library Trustees, the Board of License Commissioners, the Board of Social Services, the Cable Advisory Committee, the Commission on Aging, the Design Advisory Panel, the Fire and Rescue Services Board, the Historic Landmarks and Sites Board, the Mental Health Advisory Board the Plumbing Advisory Board, the Public Works Board, the Recreation and Parks Board, the Alcohol and Drug Abuse Advisory Board, the Commission on Disability Issues, the Council for Children and Youth, and the Soil Conservation District. [Emphasis added]*

doing so is largely beyond judicial scrutiny. *Boehm v. Anne Arundel County*, 54 Md. App. 497, 503, 549 A.2d 590 (1963). An **appealable decision** (1870) is defined as a decree or order that is sufficiently final to receive appellate review (such as an order granting summary judgment), or an interlocutory decree that is immediately appealable. *Black's Law Dictionary* 467 (9<sup>th</sup> Ed., 2009).

In the recent case of *Walker v. Dept. of Housing and Community Development*, (Md. App), No. 97, September Term (decided September 23, 2011), p. 29, the Maryland Court of Appeals referred to the Maryland Administrative Procedure Act, §10-221, that similarly sets out the requirements for a final appealable decision in a contested case that is adverse to a party: the *final decision or order shall be in writing or stated on the record, contain findings of fact and conclusions of law.*<sup>4</sup>

An order that does not satisfy constitutional due process requirements is void ab initio, but a new order can be issued by the agency that comports with the requirements of due process of law. *Uhler v. Sec'y Health and Mental Hygiene*, 45 Md. App. 282, 288, 412 A. 2d. 1287 (1980). The Court of Appeals in *Mossburg v. Montgomery County*, 329 Md. 494, 507, 620 A.2d 886 (Md., 1992), explicitly held that an agency that does not issue a written decision containing findings of fact and conclusions of law for appellate review must be reversed.

[W]e have held that the decision of a Board of Appeals in a special exception proceeding must be reversed where the Board failed to make findings of fact resolving a particular conflict. *Harford County v. Preston*, supra, 322 Md. at 503-505, 588 A.2d at 777-778. In *Preston*, Judge Karwacki for the Court explained that the "requirement" of "specific written findings of fact and conclusions of law" is "in recognition of the fundamental right of a party to a proceeding before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision["]and to permit meaningful judicial review of those findings. In a judicial review of administrative action the court may only uphold the agency order if it is sustained by the agency's findings and for the reasons stated by the agency. [Emphasis added.]

The Board contends that Norman had not raised the issue of violation of the Howard County APA in his petition for review by the Board of the Planning Board's approval of Mangione's site development plan. Majority Dec., 11. Nonetheless, where agency approval has

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<sup>4</sup> The administrative decision in *Walker* is similar to the Planning Board's approval of Mangione's SDP as merely based on testimony presented: "The testimony and evidence in this matter indicates that the decision of the Local Housing Authority should be upheld." This was found wanting by the Court and a remand was required for the hearing officer to develop a record and a "clear statement of the rationale for the decision." *Id.* at 29.

no legal efficacy – void ab initio – *Mossburg* compels that the Board has no authority to affirm such approval. The Board further contends that because this Board’s proceedings were de novo, presenting evidence anew, §2.210, Board of Appeals Rules of Procedure, Norman was afforded due process. Majority Dec., 10. But without findings of fact and conclusions of law Norman could only conjecture as to the rationale of the Planning Board’s approval and the evidence to be presented to controvert the Planning Board’s approval– a check mark is hardly informative.

Notwithstanding fundamental administrative constitutional principles of due process, the Howard County Code, the Howard County Administrative Procedure Act, and the Planning Board’s own Rules of Procedures, the Board states that it “is unaware of any law or case law that requires the Appellant to be afforded multiple opportunities to present a case and have each of those hearings be reduced to a record and a decision and order with specifically-written findings of fact and legal conclusions.” Majority Dec., 10-11.

#### **B.**

Under this Board’s Rules of Procedure §2.210 (a)(2)(iii), the “Proponent” required to present evidence first, to establish his case, was Mangione Appellee/land developer which filed an application for the site development plan with the Planning Board, and not Appellant Norman as held by the Board. Similarly, §2.207 (a) of the Board’s Rules of Procedure refers to “Petitioner or Proponent” when submitting documentary evidence to the Board; and secondly refers to “Opponent or Respondent” when submitting documentary evidence to the Board.

Section 2.210 (a)(2) sets out the order of presentation of evidence. Following opening statements at the hearing, §2.210(a)(2)(iii) provides that there shall be “*Presentation* by the party(ies) having the *burden of proof*) (“proponent”).” (Emphasis added.) Presentation refers to examination of witnesses. Thereafter the Respondent follows with examination of its own witnesses. Section §2.210(a)(4)(ii) further provides that “the *burden of proof* is upon the *appellant to show* that the action taken by the administrative agency was clearly erroneous, and/or arbitrary and capricious and/or contrary to law. Inasmuch as the burden of proof is referred to in both §2.210(a)(2)(iii) and §2.210 (a)(4)(ii), the Board majority equated “Proponent” to be the “Appellant.”<sup>5</sup>

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<sup>5</sup> The Board reverses recognition of Proponent set out in §2.210(a)(4)(iii). Majority Dec., 10. It is stated that the Board determined that Appellant Norman had the burden of proof, therefore Appellant Norman was

The Board failed to distinguish between burden of proof of *presentation*, i.e., *production of evidence*, and burden of proof to *show*, i.e. *persuasion based on upon evidence* developed in the case. These dual separate components of burden of proof are extensively discussed (when considering the issue of standing) in *Renaissance Centro Columbia, LLC ("RCC") v. Broida* (Ct. of Special Appeals, No. 1666, September Term, 2007, decided July 23, 2008 (rev. on other grounds, *Renaissance Centro Columbia, LLC v. Broida*, Court of Appeals of Md., No. 104, September Term, 2008, filed August 19, 2011)). "*The burden of proof is comprised of the burden of production and the burden of persuasion.*" *Id.*, pp. 15-16.

That the land developer who seeks agency approval for a particular land use is the Proponent has long been recognized by the Maryland Court of Appeals in a Howard County case more than 50 years ago. See County Com'rs of Howard County v. Merryman, 159 A.2d 854, 222 Md. 314, 318 (Md., 1959).

The action of the County Commissioners in both instances was appealed to the Circuit Court for Howard County. The *refusal to rezone* at the first hearing was *appealed by the proponent* and was affirmed by the circuit court, but there was no appeal to this Court. The grant of rezoning at the second hearing was *appealed by the protestants* and was reversed by the circuit court, and, as stated, *the proponent prosecuted this appeal*. [Emphasis added.]

*Accord: Save Our Streets v. Mitchell*, 357 Md. 237, 743 A.2d 748, 752 (Md., 1998) ("Section 710 would have permitted exemptions to its limitations if a *proponent of development* could prove, by clear and convincing evidence, that the proposed development would 'not impact or affect the adequacy standards.'" [emphasis added])

A long held axiom of statutory construction is that when legislation is enacted using different terms in the same statute, it is intended that they have different meanings and plain meanings of the terms should be recognized. Maguire v. State, 65 A.2d 299, 302 (Md., 1949)

We agree with the lower court's statement, but not with its application, of the rules of statutory construction. *This court has endeavored to adhere to the meaning of words and not to follow different trends by treating words as mere*

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Note 5 (cont.)

the Proponent. But it was incumbent on the Board to first identify the Proponent, who would then have the burden of proof of presentation of evidence, case in chief, under §2.210(a)(4)(iii). The Board majority mischaracterized Appellant as the Proponent. "Appellant" contained in §2.210 (a)(4)(ii) of the Board's Rules would not be surplusage, as suggested in the majority decision, *Id.*, since that refers to the burden of persuasion pertaining the Board's decision making authority, not to the initial burden to present evidence during the evidentiary proceedings.



*counters in an exercise in semantics or hurdles to be jumped in a quest for 'legislative intent' in a wordless limbo of speculation about 'the meaning of meaning,' the Zeitgeist and other pretexts for judicial legislation. (Citations omitted.)* cf. Statutory Interpretation, Radin, 43 Harvard Law Review 863; A note on 'Statutory Interpretation,' Landis, 43 Harvard Law Review 886; The Plain Meaning Rule, Jones, 25 Washington University Law Quarterly 2. It is true, as has been said and is illustrated by the instant case, that determination of the 'plain and unambiguous meaning' of words is often the result of interpretation. We think there is a real, though not precise, difference between such interpretation and conscious departure from words in pursuit of a disembodied 'legislative intent'". [Emphasis added]

Thus, if "Proponent" was to mean "Appellant" in §2.210(a)(2)(iii) of the Board's Rules of Procedure, "Appellant" would be stated – as contained in §2.210 (a)(4)(ii) and §2.210 (b)(2) (filing of memorandum by Appellant for an appeal on the record).

### C.

Section 130 C of the Howard County Zoning Regulations provides the Board authority to reverse the Planning Board's approval of Mangione's site development plan upon finding that the condominiums would impose a heavier traffic burden on Turf Valley Road thereby creating a dangerous traffic condition that would jeopardize the lives and/or property of people living in the neighborhood.

Norman presented extensive testimony of neighbors residing in the vicinity of Turf Valley Road and a video of Turf Valley Road as an automobile traverses the road between Resort Road and Route 40 – to demonstrate that the condition of the road would be unsafe and jeopardize the lives and property of people living in the neighborhood with the added traffic burden following construction of the condominiums. Section 130 C of the zoning regulations requires that Board members, i.e., Hearing Authority, *shall examine* the specific property involved and the immediate neighborhood where the Hearing Authority is called upon to decide certain issues. The undersigned Board member has traversed Turf Valley Road a few times and confirms the evidence presented by Norman of its configuration and condition.

As presently exists, Turf Valley Road terminates at an intersection with Rt. 40, which is the only ingress and egress for all residences on Turf Valley Road, Resort Road and all development east of Turf Valley Road. While Resort Road is planned to be extended to Marriottsville Road from Turf Valley Road, only after it is constructed will

the traffic burden be mitigated that would be imposed on Turf Valley Road by the two condominiums consisting of 60 units – 60 residences.

Mangione contends – and admits – that “*Appellant calls into question virtually every aspect and impact of traffic* [on Turf Valley Road] except the standard as required by HCZR Sec. 126 F.4.d. . . .” (Emphasis added.) Mangione Mem. 10-11. This provision of the Zoning Regulations incorporates by reference the Adequate Public Facilities Ordinance (Title 16, Subtitle II of the Howard County Code). Section 126 F.4.d of the regulations, however, does not pertain to safety of the internal road when traffic traverses the road but requires a traffic study, i.e., a traffic count – volume of traffic – where the road intersects with other roads so to determine if the volume of traffic generated will pass through an intersection in an appropriate amount of time. In such a study no consideration is given to internal aspects of the road itself respecting safety, when the condominium project would create an additional traffic burden on the road. Mangione’s traffic expert, Mickey Cornelius, traffic engineer and Senior Vice-President of the Traffic Group, Inc. (“TTG”), testifying as to the traffic impact of a traffic study pursuant to §126 F.4.d of the proposed development, so testified.

Mangione further contended that §130 C, Zoning Regulations is inapplicable to this case. However, at the outset, §100 A of the Zoning Regulations, General Provisions, sets out the legislative intent of the regulations: “These zoning regulations and maps are being enacted for the purpose of preserving and *promoting the health, safety and welfare of the community.*” (Emphasis added.) Section 130 C relates “Limitations, Guides and Standards” of authority of the Board of Appeals pertaining to safety considerations referred to in §100 A.

Section 130 A. 4. provides, except as otherwise provided in §130, if an *application* is disapproved by the Hearing Authority, thereafter the Hearing Authority shall take no further action on another *application for the same or substantially the same proposal on the same premises* until after 24 months from the date of the last disapproval (excluding certain exceptions). (Emphasis added.) In this context, “application” so refers to and is the land developer’s proposal for development of a land area or site, e.g., site development plan.<sup>6</sup> Mangione contended before the Board that “application” merely refers to a request for

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<sup>6</sup> To illustrate that words can have different meanings in different contexts, in the world of computers and internet usage, “application” refers to a particular kind of software, i.e., “a program (as a word processor or a spread sheet) that performs one of the important tasks for which a computer is used.” *Merriam-Webster Collegiate Dictionary* 56 (10<sup>th</sup> Ed., 1993).

consideration by the Planning Board of its proposed site development plan, and therefore is not before the Board on appellate review. Mangione Mem 14.

The Board, similarly asserts, Majority Dec.16, that §130 C is not applicable to this case because it provides that an “application shall not be approved where” (where safety considerations are paramount), stating that the approval function of Mangione’s application for site development plan is solely the province of the Planning Board – imputing, too, that “application” is merely a request for approval by the Planning Board rather than referring to the land use proposal itself submitted for approval – and not before this Board which considers the matter on appellate review. The Board majority would thus eviscerate its §130 C authority under the Zoning Regulations – an exercise in sophistry. The Board’s affirmance of the Planning Board’s approval of Mangione’s site development plan is Board approval of Mangione’s application for site development plan. Otherwise, Mangione is not able to proceed with its site development plan. The Board of Appeals *must* consider the “legislative intent of these regulations as provided in Section 100 A, i.e., “*promoting the health, safety and welfare of the community.*” (Emphasis added.)

In addition to setting out other certain powers of the Hearing Authority in §130 B pertaining to zoning regulations, the Hearing Authority *must* observe the Limitations, Guides and Standards of §130 C when exercising its authority under the zoning regulations. This provides that “the *application* [land development proposal] *shall not be approved* where the Hearing Authority *finds that the proposed structure, addition, extension of structure or use, use or change of use, would menace the public health, safety, security, or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood.*” In deciding such matters, the Hearing Authority *shall give consideration*, among other things, to the following (as pertinent to Mangione’s application for the condominiums’ site development plan) (emphasis added.):

1. The number of people residing, working or studying in the immediate areas.
2. *Traffic conditions including facilities for pedestrians, such as sidewalks and safety zones and parking facilities and the access of cars to highways.*
3. The orderly growth of the community.
4. The reasonable needs of the entire community and particular neighborhoods.
5. *The legislative intent of these regulations as provided in Section 100.A.*



Section 130 C thus overrides other applicable zoning regulations, regarding safety of lives or property of people living in the neighborhood, requiring that the Board, sua sponte, *shall consider* the dangerous traffic conditions that would be created by affirming the Planning Board's approval of Mangione's site development plan: to consider whether there is an absence of facilities for pedestrians such as sidewalks, safety zones, parking facilities, and access of cars to highways that would result in jeopardizing the lives or property of people living in the neighborhood.

As noted, Mangione instead relies on §126 F.4.d respecting traffic considerations that incorporates by reference the Adequate Public Facilities Ordinance (Title 16, Subtitle 11 of the Howard County Code). This in turn, §16.1101(c), requires traffic studies as specified in the Howard County Design Manual. Volume III of the Howard County Design Manual, Roads and Bridges, Chapter 4 – Adequate Road Facilities Test Evaluation Requirements – requires the developer to analyze intersections and to test them with traffic volumes. Chapter 5 –Traffic Studies. Para. 5, states that “The *prime functions of roads and intersection are the movement of traffic*, both vehicular and pedestrian, and the *provision of access to adjacent land*.” (Emphasis added.) No provision of the Design Manual sets out requirements regarding considerations, conditions or use of the internal structure of a road.

Mr. C. Edward Walter, a registered professional engineer with 45 years of experience and Chief Traffic Engineer of Traffic Engineering Division of Howard County Department of Public Works from 1988-1999, testifying on behalf of Norman, so confirmed that safety of the internal road structure is not considered for a traffic study undertaken in accordance with §126 F.4.d. Safety of roads that will be impacted by proposed development must be considered by the Board as required by Zoning Regulation §130 C.

Testimony and documentary evidence presented by Norman reveal that the extension of Resort Road from Turf Valley Road to the existing Resort Road segment on the west connecting to Marriottsville Road was scheduled to be paved by Summer 2010. This has not been accomplished to date. This will not to be accomplished until 2014 as testified by Mr. Walter. Mr. Walter assisted in developing the Howard County Road Design Manual. He also authored 12 papers on traffic engineering, and a study plan to assess traffic in the Turf Valley development area.

Mr. Walter further stated that even with the connecting extension of Resort Road there are presently no plans to widen the Marriottsville Road bridge over route I-70; this is out of step with the widening of Marriottsville Road itself. This will create delays at

Marriottsville Road and Resort Road resulting in diversion of traffic to Turf Valley Road in order for autos to ingress and egress at Route 40, thereby creating congestion on Turf Valley Road and the intersection with Route 40. Traffic presently exceeds 200% to 300% of design criteria for Turf Valley Road as a minor collector road, which will be further increased by the condominium project; this is a minor collector road having major collector road volume. Current specification width of a minor collector road is 25 feet whereas width of a major collector road<sup>7</sup> is 40 feet and requires a minimum edge of a curb. Mr. Walter stated that Turf Valley Road should be widened to 40 feet to handle the traffic on it. However, there are no plans to widen Turf Valley Road. The Turf Valley development in toto is a subdivision and the condominium project in this case should not be considered in isolation of other development in the area. Mr. Walter stated that *"as a matter of safety, pedestrians, bicycles and golf carts should not be permitted on Turf Valley Road,"* This road is 3500 feet long.

The Board's majority decision refers to *Anderson v. Sawyer*, 23 Md. App. 612, 618, 329 A.2d 716 (1974). Majority Dec., 15. That case holds that unsupported conclusions of witnesses to the effect that a proposed use will or will not result in harm amount to nothing more than vague and generalized expressions of opinion which are lacking in probative value. The instant case is clearly distinguishable in that Mr. Walter, a former Chief Traffic Engineer, Department of Public Works of Howard County, who has specific knowledge and expertise in the development of the Turf Valley development property, confirms and supports the specific and detailed safety concerns that the residents testified to along Turf Valley Road.<sup>8</sup>

Mr. Walter was not called upon to testify as to APFO traffic studies and did not do so. "Mr. Walter made it clear that his testimony was not addressing the test under the capacity and

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<sup>7</sup> Volume III of the Howard County Design Manual, Roads and Bridges, Chapter 1, Para. 1.5 defines "Major Collector Road":

- A. Provides the primary access to an arterial road for one or more neighborhoods or on-residential areas.
- B. Distributes based trips to or from arterial.
- C. Provides a limited amount of travel through neighborhoods and non-residential areas which originates and terminates externally.
- D. Provides direct connections to local roads and minor collectors.
- E. Provides collection and distribution routes for mass transit system.
- F. Basic trip length is generally from 3-10 miles.

<sup>8</sup> The hearings in this case were voluminous: hearings were held on March 1, 8, 16, April 12, May 10, 24, June 14, August 4, 30, November 8, 30, December 13, 2011. Majority Dec., 1. The Board's majority decision does not accurately recount the testimony of Norman's witnesses, describing such testimony in vague generalities while omitting detail and specificity of factual testimony to which *Anderson* would then apply. Testimony of Mr. Walter that superficially appears to support Mangione's case is only provided in detail, as well as testimony of Mangione's witness, Mr. Mickey Cornelius.

mitigation standards of the Adequate Public Facilities Ordinance (Title 16, Subtitle 11 of the Howard County Code). Instead, Mr. Walter was addressing a generic issue of traffic safety.” Majority Dec., 6. Mr. Norman similarly testified as to the “generic issue of traffic safety.” Majority Dec. 7-8. *See, too, page 8, supra.*

APFO traffic studies on Turf Valley Road were not put in issue and contested by Appellant Norman. The issue listed in Appellant’s petition for appeal states: “(5) the Planning Board erred in finding that the traffic impact from the proposed use is acceptable.” Majority Dec., 4. Appellant Norman looked to the traffic impact as regards increased traffic affecting safety to the residents on and east of Turf Valley Road following construction of the two condominium buildings. “Appellant presented no evidence as to whether roads serving the PCCC District will be adequate, as determined by the capacity and mitigation standards of the Adequate Public Facilities Ordinance.”<sup>9</sup> Majority Dec., 15.

Albeit that Mangione spent much time during the Board proceedings on it, APFO traffic studies were a non-issue in the case.

Mangione had Mr. Mickey Cornelius testify to traffic studies on Turf Valley Road, volume of traffic at intersections, discussed *supra*, that do not involve study of safety considerations of the internal structure of the road. *Id.* He further testified that “safety of any segment of Turf Valley Road is not part of the test to determine the capacity or mitigation standards of the Adequate Public Facilities Ordinance (Title 16, Subtitle II of the Howard County Code).” Majority Dec., 8-9. He has no expertise regarding safety considerations of the internal structure of the road. The Board majority decision states that “Mr. Cornelius also testified that he believed that Turf Valley Road was safe. He opined that Turf Valley Road is generally safe and does not possess extraordinary topography to cause unsafe conditions. . . . to require a developer to upgrade or fix a public road beyond 250 feet of a proposed development.” Majority Dec., 8.

First, Norman’s focus of the issue of safety was that the proposed condominium construction should not be approved until the Resort Road extension/connection to Marriottsville Road was constructed so to mitigate the increased traffic burden on Turf Valley Road that will result following construction of the condominiums and/or that other solutions be developed by

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<sup>9</sup> The stated issue presented to the Board for appeal was apparently unclear to the Board, and exemplifies the need for the Planning Board’s rationale – findings of fact and conclusions of law – of approval of Mangione’s site development plan, for which a check mark was substituted.



the County offices to provide for the safety of Turf Valley Road. (Mr. Walter testified that the developer of the Turf Valley development has been required to widen Mariottsville Road to 5 lanes.) Secondly, Mr. Cornelius's opinion – without evidentiary support that the Turf Valley Road is generally safe – does not controvert testimony of Mr. Walter and residents who testified as to the detailed condition and uses of Turf Valley Road giving rise to their safety concerns. Such opinion testimony has no probative value. *Anderson v. Sawyer, supra*. Indeed, to the contrary, Mr. Cornelius also testified that he observed that there were no sidewalks along Turf Valley Road, but ditches along the edge of the road for rain runoff.<sup>10</sup> In this regard, residents have testified that because there are no sidewalks on Turf Valley Road they walk and bicycle on the road and children play on the road, and golf carts regularly drive up and down Turf Valley Road at 10 mph and cross the road from one side of the golf course to the other.

Dr. Linda Ellis Spencer and her husband who reside near the top of Turf Valley Road testified that from her measurements Turf Valley Road has variable width: 24 feet to 35 feet, and that to avoid pedestrians who are walking on the road, it is necessary for cars to cross the yellow line. The upper half of Turf Valley Road, cut into a hillside, has a total of 22 houses constructed on the upside and downside of the hill. Consequently, there is no room for vehicles to move safely off on the side of the road, and also not be on private property: to avoid pedestrians walking on the road, to allow for parking on the road, and for vehicles to pull over for other vehicles to pass.

Dr. Spencer, by testimony and graphic video presentation, demonstrated that Turf Valley Road is hilly with curves and traffic bumps. Majority Dec., 5. Children wait on the edge of Turf Valley Road for school buses. Winter snows remove any delineation of the edge of Turf Valley Road. Although Turf Valley Road is to provide two way vehicle passage, large trucks and buses cannot pass each other on the road, necessitating that one vehicle stop at a point where the road is a little wider to permit the other vehicle to pass by.

Mr. Robert Osterguard, has twin girls 15 years old and has lived on Turf Valley Road for 7 years. He stated that because there are no sidewalks he walks his dog on Turf Valley Road to the intersection of Resort Road and dodges traffic as he walks on the road. During rainfall the road fills with swales. Sidewalks are needed to make Turf Valley Road safer. He

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<sup>10</sup> Para. 5.2.D, Vol. III, Design Manual, recognizes that "Safety and general community well-being is greatly enhanced by consideration of and provision for pedestrian and bicyclist needs. Careful planning and design of sidewalks, separate walkways and/or bike/pedestrian paths/trail, and the intersection of pedestrian and vehicular paths benefit not only pedestrians but also motorists due to the removal of pedestrians from the roadway."

is concerned that an increase in traffic resulting from construction of the condominiums will further decrease safety for pedestrians.

Ms. Holly Allen, resident on Turf Valley Road for 18 years, testified that Turf Valley Road, constructed as a minor collector road, has not been a dead end road for 15 years when Resort Road was constructed to serve development east of Turf Valley Road. Speed bumps were installed on Turf Valley Road three years ago. Notwithstanding, cars speed along at 60 mph and pop over the speed bumps; teenagers use Turf Valley Road for such drag races. Her car was sheared off by a speeding vehicle. Ms. Allen, with three children ages 24, 18 and 15, while not contesting development per se, is concerned about safety on Turf Valley Road, as are her neighbors. She wishes that development be slowed down until roads are studied and improved.

Presently, 152 residences are served by Turf Valley Road, having only one outlet intersection connection to Route 40. The proposed condominiums will add 60 more residences, an increase of approximately 40%. Inasmuch as traffic on Turf Valley Road as a minor collector road is presently oversubscribed by 200% to 300% of the design requirements, by extrapolation, traffic attributable to the condominiums would cause traffic on the road to be oversubscribed by 280% to 420%. If the Resort Road extension/connection were to be constructed before construction of the condominiums, the access to Marriottsville Road from Turf Valley Road would mitigate the additional traffic burden on Turf Valley Road.<sup>11</sup>

Considering the present internal configuration, condition and how Turf Valley Road is used, safety from traffic is a paramount concern. Additional traffic on Turf Valley Road resulting from the condominiums would create a dangerous traffic condition that would jeopardize the lives and/or property of people living in the neighborhood.

While Mr. Walter may not have referred to a specific provision of law that required the Board to deny the Planning Board's approval of Mangione's site development plan based on safety issues, Majority Dec., 6 – he has no legal expertise – the Board was required to do so sua sponte pursuant to §130 C of the Zoning Regulations.

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<sup>11</sup> With regard to APFO standards (traffic study of an intersection), Para. 4.5 D, Vol. III, Design Manual, sets out mitigation requirements: when the analysis of an intersection indicates that the level of service (volume of traffic served by the intersection) will be below the adopted level of service standard, the developer shall revise the project with one or more of the following actions, e.g., "A. Defer the project until a future date when the Adequate Road Facilities Test Evaluation indicates that the level of service standard will not be exceeded." Comparably, the Planning Board certainly can require that Mangione's condominium site development plan and construction be undertaken after the Resort Road extension/connection is constructed to mitigate the traffic safety issues raised and documented by the residents in the neighborhood.

### **Conclusion**

The Planning Board had not issued a written decision containing findings of fact and conclusions of law upon which Norman could base his appeal to the Board, and thereby be provided due process notice as to the rationale of the Planning Board's decision. Because it denies due process of law, the Planning Board's check mark approval of Mangione's SDP is void ab initio – having no validity.

This Board, too, erred in mischaracterizing Appellant/Norman as the Proponent under §2.210(a)(2)(iii) of the Zoning Regulations, requiring him to proceed first with the burden of proof to present evidence instead of Mangione/Appellee land developer who is the Proponent of its SDP application proposal for the condominiums. This, further, put Norman in an unfair position, to contest in the first instance a rationale of the Planning Board that had not been rendered as the basis for approving Mangione's SDP.

The Board also failed to follow the requirements of §130 C of the Zoning Regulations to consider the configuration, condition and use of Turf Valley Road that would result in a dangerous traffic condition jeopardizing the lives or property of people living in the neighborhood from increased traffic that could be expected on Turf Valley Road following construction of the condominiums.

In sum, in addition to not recognizing the invalidity of the Planning Board's approval of Mangione's site development plan for the condominiums, the Board mischaracterized "Proponent" as "Appellant" in §2.210(a)(2)(iii), Board's Rules of Procedure, and failed to give due regard to safety considerations on Turf Valley Road required by §130C of the Zoning Regulations, resulting in a wrongful affirmation of the Planning Board's approval of Mangione's site development plan.

Yet, Mangione's site development plan application may again be submitted for approval by the Planning Board which would be required to issue a rationale – findings of fact and conclusions of law contained in a written decision – after the Resort Road extension/connection is constructed to provide traffic access from Turf Valley Road to Marriottsville Road, thereby mitigating the increased traffic burden on Turf Valley Road.



With regard to multiple errors of law in this case, the Board should have remanded the case back to the Planning Board for further consideration to comply with the foregoing requirements of the Howard County Code and Zoning Regulations. §2.210(a)(4)(ii), Board's Rules of Procedure.

I therefore dissent from the Board's affirmance of the Planning Board's approval.

Date: *January 31, 2011*

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Henry Eagles".

Henry Eagles  
Member, Board of Appeals